Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

TRANSAMERICAN NATURAL GAS CORPORATION,

Petitioner,

v.

ZAPATA PARTNERSHIP, LTD.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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70 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred by applying the "clearly erroneous" standard set forth in Rule 52(a) of the Federal Rules of Civil Procedure to a nonexistent finding of fact, in violation of the holding in *Kelley v. Southern Pacific Co.*, 419 U.S. 318 (1974).

2. Whether the Court of Appeals erred by affirming the judgment of the bankruptcy court on the basis of the "clearly erroneous" standard, even though the Court of Appeals found that the legal test applied by the bankruptcy court was incorrect as a matter of law, in violation of the holdings in *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), and *Kelley v. Southern Pacific Co.*, 419 U.S. 318 (1974).

3. Whether the Court of Appeals erred by failing to remand for a new trial in light of its holding that paragraph 7 of the settlement agreement between Petitioner and Respondent is ambiguous, because (a) while the case was pending in the bankruptcy court, the parties agreed that paragraph 7 was *un*ambiguous and that parol evidence was therefore inadmissible; (b) the bankruptcy court repeatedly stated on the record that paragraph 7 was *un*ambiguous; (c) the case was litigated based on the assumption by both parties and the bankruptcy court that paragraph 7 was *un*ambiguous; and (d) the bankruptcy court made no findings of fact to resolve the ambiguity found by the Court of Appeals.

4. Whether the Court of Appeals violated Rule 52(a) of the Federal Rules of Civil Procedure and deprived

QUESTIONS PRESENTED FOR REVIEW – Continued

Petitioner of due process by reversing the bankruptcy court's holding that paragraph 7 of the settlement agreement between Petitioner and Respondent is unambiguous, but refusing to grant Petitioner a new trial at which the parties could fully and fairly litigate the meaning of the ambiguous language of paragraph 7 on the basis of parol evidence.

PARTIES TO THE PROCEEDING

TransAmerican Natural Gas Corporation, Petitioner

Non-wholly owned subsidiary: TransTexas Gas Corporation

Zapata Partnership, Ltd., Respondent

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No. _____

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October Term, 1993

TRANSAMERICAN NATURAL GAS CORPORATION,

Petitioner,

v.

ZAPATA PARTNERSHIP, LTD.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner TransAmerican Natural Gas Corporation ("TransAmerican") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 27, 1994.

OPINION BELOW

The opinion of the Court of Appeals is reported as *In re Fender (TransAmerican Natural Gas Corporation v. Zapata Partnership, Ltd.)*, 12 F.3d 480 (5th Cir. 1994). The opinion of the district court is unreported. The bankruptcy court

entered findings of fact and conclusions of law, but did not publish an opinion. The opinions of the district court and the bankruptcy court and the findings of fact and conclusions of law of the bankruptcy court are all set forth in the Appendix to this Petition.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on January 27, 1994. The Court of Appeals denied TransAmerican's timely petition for rehearing on March 15, 1994, and this Petition is being filed within ninety days of that date. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

Rule 52(a) of the Federal Rules of Civil Procedure states, in pertinent part:

> In all actions tried upon the facts without a jury, or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon. . . . Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

The Fifth Amendment to the United States Constitution states, in pertinent part:

No person shall . . . be deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

TransAmerican and Zapata Partnership, Ltd. ("Zapata") are companies engaged in the oil and gas business. As of 1986, TransAmerican and Zapata were cotenants with respect to the minerals underneath a portion of the La Perla Ranch in Zapata County, Texas. TransAmerican drilled three successful gas wells on the property, which are the subject of a dispute concerning Zapata's entitlement to a share of the proceeds from the gas produced from the wells. (VIII R. A-48 at 16).

A group of creditors placed Zapata into an involuntary bankruptcy proceeding in March 1987. Zapata then filed an adversary proceeding against TransAmerican, seeking an accounting for its share of the revenue from the gas sold from the wells on the La Perla Ranch. In December 1988, TransAmerican and Zapata entered into a settlement agreement ("the Settlement Agreement") which, among other things, provided that (a) TransAmerican would pay $1,700,000.00 to Zapata; (b) Zapata would convey its mineral and royalty interest in the La Perla Ranch property to TransAmerican in exchange for an overriding royalty interest that was much more valuable; and (c) Zapata would retain its pro rata share of certain money received by TransAmerican from El Paso Natural Gas Company ("El Paso") in a separate lawsuit ("the El Paso Suit"). (Plaintiff's Exh. 1; VIII R. A-48 at 17-18). It is undisputed that TransAmerican has paid the

$1,700,000.00 to Zapata and that TransAmerican conveyed the overriding royalty interest to Zapata. Consequently, the only dispute concerning the Settlement Agreement relates to the proceeds from the El Paso Suit that Zapata retained under the Settlement Agreement.

TransAmerican's claims in the El Paso Suit were based on a gas contract between TransAmerican and El Paso. TransAmerican sought three distinct types of damages from El Paso: (a) damages based on El Paso's payment of an inadequate price for gas that it bought under its contract with TransAmerican, (b) damages based on the "take-or-pay" provision in the contract, and (c) damages based on El Paso's repudiation of the contract. (III R. A-128 at 179-200). After a jury trial, TransAmerican received a judgment (after a substantial remittitur) for $480,309,341.34 in damages, plus attorneys' fees and costs. (Plaintiff's Exhs. 31, 32, 33, and 34).

TransAmerican entered into the Settlement Agreement with Zapata while the judgment in the El Paso Suit was on appeal. Paragraph 7 of the Settlement Agreement provided that Zapata would retain its pro rata share of certain money recovered by TransAmerican in the El Paso Suit:

> Plaintiff [Zapata] will retain and be entitled to receive its pro rata portion of any money received by Defendant [TransAmerican] as a result of its litigation with El Paso Natural Gas Corporation with respect to any differential in price applicable to the sale of gas from wells drilled on the [La Perla] Ranch. Plaintiff's share of any such proceeds will be for gas sold through October 31, 1988. Any adjustment in the

> price obtained from gas or make-up gas taken after that date will be paid on the basis of Plaintiff's 17.5% overriding royalty interest.

(Plaintiff's Exh. 1 at 2.) Several months after the execution of the Settlement Agreement, TransAmerican and El Paso settled the El Paso Suit. El Paso gav TransAmerican approximately $300,000,000.00 in cash, as well as properties with a value of approximately $100,000,000.00.

A dispute then arose between TransAmerican and Zapata concerning the calculation of Zapata's share of the proceeds from the El Paso Suit. Under Zapata's interpretation of paragraph 7 of the Settlement Agreement, Zapata would be entitled to share in each of the three types of damages described above: "price damages," "take-or-pay" damages, and "repudiation" damages. Under TransAmerican's interpretation, on the other hand, Zapata is entitled to share only in the "price" damages. That distinction makes a huge difference: Zapata is claiming $7,300,210.93 under its interpretation, but Zapata would be entitled to only $806.00 under TransAmerican's interpretation.[1]

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[1] TransAmerican's interpretation is supported by the language of paragraph 7, which states that Zapata would "retain" its share of any damages for "gas sold." Prior to the execution of the agreement between TransAmerican and Zapata, Zapata had no right to share in the "take-or-pay" and "repudiation" damages. Consequently, Zapata could not possibly have "retained" such a right under the settlement. Moreover, the "take-or-pay" and "repudiation" damages relate to El Paso's *failure* to purchase gas in accordance with the contract between El Paso and TransAmerican, and those damages are thus not for "gas sold." As discussed below, the Court of Appeals did not address those arguments.

Zapata then filed a second adversary proceeding against TransAmerican, seeking to recover damages from TransAmerican based on Zapata's interpretation of paragraph 7.[2] At the time of the trial of the adversary proceeding, both parties agreed that paragraph 7 was unambiguous, so that parol evidence concerning the meaning of paragraph 7 was inadmissible. (Transcript, vol. 2, at 80.) The bankruptcy judge agreed with that view, stating that he would not consider any parol evidence (Transcript, vol. 4, at 20) and that, if Zapata "opened up" the introduction of parol evidence, "we'd almost have to retry this case" (Transcript, vol. 6, at 71). After the trial, the bankruptcy court ruled in favor of Zapata and awarded Zapata $7,300,210.93 plus attorneys' fees. (VIII R. A-71). TransAmerican appealed to the district court, which affirmed the bankruptcy court's judgment in its entirety.

The Court of Appeals affirmed the judgment of the bankruptcy court, except with respect to Zapata's claim for breach of a duty of good faith and fair dealing and with respect to the award of attorneys' fees to Zapata.[3]

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[2] The bankruptcy court had jurisdiction over the adversary proceeding pursuant to 28 U.S.C. § 157.

[3] The bankruptcy court found that TransAmerican breached a duty of good faith and fair dealing to Zapata. (VIII R. A-70 at 17). On appeal, the Court of Appeals reversed that finding and remanded for a redetermination of damages. *See* Appendix, pp. 12A-13A. Although the precise percentage of the overall damage award that is attributable to the duty of good faith and fair dealing is unclear, TransAmerican anticipates that some or all of the award of damages will be eliminated on remand.

However, the Court of Appeals' analysis was radically different from the bankruptcy court's analysis. The Court of Appeals found that paragraph 7 was *ambiguous* as a matter of law, so that parol evidence was admissible to prove the meaning of paragraph 7. *See* Appendix, p. 9A. The Court of Appeals then held that the bankruptcy court had properly admitted parol evidence and that the bankruptcy court's interpretation of paragraph 7 based on that evidence was not "clearly erroneous" within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure. *See* Appendix, pp. 9A-10A.

TransAmerican filed a petition for rehearing, pointing out that the bankruptcy court (and the parties) had treated paragraph 7 as *un*ambiguous at trial and that the bankruptcy court had expressly stated that parol evidence would *not* be considered. The Court of Appeals denied the petition for rehearing.

REASONS FOR GRANTING THE WRIT

The primary substantive issues in this case are governed by Texas contract law. This Petition is not based on any of those substantive issues. Instead, the issues raised in this Petition relate to federal appellate procedure and to the proper application of Rule 52(a) of the Federal Rules of Civil Procedure.[4]

[4] Rule 52(a) is made applicable to bankruptcy cases by Rule 7052 of the Federal Rules of Bankruptcy Procedure.

The bankruptcy court treated paragraph 7 of the Settlement Agreement as unambiguous, so that parol evidence offered to interpret paragraph 7 was inadmissible. (Transcript, vol. 4, at 20). Under Texas law, the interpretation of an unambiguous contract is a question of law. *See Westwind Exploration, Inc. v. Homestate Savings Association*, 696 S.W.2d 378, 381 (Tex. 1985). However, the Court of Appeals rejected the argument that paragraph 7 was unambiguous and instead held that paragraph 7 was ambiguous. *See* Appendix, p. 9A. Under Texas law, the interpretation of an ambiguous contract is a question of fact to be determined on the basis of parol evidence. *See Harris v. Rowe*, 593 S.W.2d 303, 306 (Tex. 1979). The Court of Appeals did not remand for a determination of that question of fact, but instead held that the bankruptcy court's interpretation of paragraph 7 was not "clearly erroneous." *See* Appendix, p. 10A.

The Court of Appeals' analysis is both erroneous and dangerous. TransAmerican does not dispute that the Court of Appeals had the power to rule that paragraph 7 is ambiguous, even though the bankruptcy court had reached the opposite conclusion. However, the legal standard for the interpretation of an ambiguous contract is different from the legal standard for the interpretation of an unambiguous contract. Because the Court of Appeals was rejecting the legal basis for the bankruptcy court's judgment, the proper result would have been a remand for findings of fact under the correct legal standard. *See Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982) ("[W]here findings are infirm because of an erroneous view of the law, a remand is the proper course unless the

record permits only one resolution of the factual issue."); *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 331-32 (1974).

The Court of Appeals did not remand for a new trial or new findings based on the proper legal standard. Instead, the Court of Appeals stated that the bankruptcy court had made an "implied finding" of ambiguity by admitting parol evidence. *See* Appendix, p. 9A. The Court of Appeals then applied the "clearly erroneous" standard of Rule 52(a) to affirm the bankruptcy court's purported resolution of the ambiguity based on parol evidence. *See* Appendix, p. 10A.

As demonstrated below, the bankruptcy court made no "implied finding" of ambiguity, but instead expressly stated that it was treating paragraph 7 as *un*ambiguous. Moreover, the bankruptcy court made no findings of fact regarding the intent of the parties based on parol evidence. Consequently, the record is devoid of any factual findings that would support the application of the "clearly erroneous" standard. *See Kelley v. Everglades Drainage District*, 319 U.S. 415, 420-22 (1943) ("[T]here must be findings, stated either in the court's opinion or separately, which are sufficient to indicate the factual basis for the ultimate conclusion."). Thus, the Court of Appeals applied the "clearly erroneous" standard to a nonexistent finding of fact.

The Court of Appeals' analysis also effectively deprived TransAmerican of its right to a trial on a controlling issue of fact. When the case was tried before the bankruptcy court, the parties and the bankruptcy court treated paragraph 7 as unambiguous. Consequently, neither party was on notice that parol evidence was relevant

or material. Now that the Court of Appeals has determined that paragraph 7 is ambiguous, TransAmerican is entitled to a trial based on plenary consideration of parol evidence.

The Court of Appeals avoided that result by purporting to identify findings of fact by the bankruptcy court based on parol evidence and then applying the clearly erroneous standard to those findings. *But see Kelley*, 419 U.S. at 331-32 (rejecting a Court of Appeals' reliance on an implied finding of fact when the district court opinion did not clearly and expressly resolve the factual issue). Under the Court of Appeals' analysis TransAmerican will never get the chance to fully and fairly litigate the meaning of the allegedly ambiguous language of paragraph 7. That result is unfair, inconsistent with the purpose of Rule 52(a), and contrary to due process. This Court should therefore grant this Petition.

I. The Court of Appeals Erred by Applying the "Clearly Erroneous" Standard to a Nonexistent Finding of Fact.

The Court of Appeals' analysis is undermined by the record from the bankruptcy court. In the bankruptcy court, both parties agreed that paragraph 7 was unambiguous. Counsel for Zapata stated:

> Your Honor, we also agree and I'm quite surprised to hear [counsel for TransAmerican] also say that Paragraph 7 is very clear and unambiguous. . . . It seems like both parties are saying Paragraph No. 7 is not ambiguous. It's very clear and the Court can interpret what it means.

(Transcript, vol. 2, at 80.) Later, counsel for Zapata objected to parol evidence offered by TransAmerican, arguing that the intent of the parties was irrelevant because "we didn't plead ambiguity." (Transcript, vol. 7, at 196-97).

Nevertheless, the bankruptcy court admitted a considerable amount of parol evidence offered by both parties. However, the bankruptcy court made it clear that the parol evidence was being admitted for a limited purpose. For example, the bankruptcy court stated that certain testimony being offered by Zapata was proper to the extent that it "explained" the terms of paragraph 7, but that "if it does go beyond that then I won't consider it for any reason." (Transcript, vol. 4, at 20.) Similarly, during the testimony of Craig Shephard (the president of TransAmerican), counsel for Zapata moved for a trial amendment to add a fraud claim against TransAmerican. (Transcript, vol. 6, at 68-69.) The bankruptcy court cautioned counsel for Zapata that an allegation of fraud "opens up introduction of parol evidence in the agreement itself." (Transcript, vol. 6, at 70.) In fact, the court stated that, if Zapata "opened up" the introduction of parol evidence, "we'd almost have to retry this case." (Transcript, vol. 6, at 71).

The bankruptcy court eventually adopted the findings of fact and conclusions of law submitted by Zapata. Those findings *did not* include a finding of ambiguity, nor did the bankruptcy court make *any* determination regarding the intent of the parties based on parol evidence. *See* Appendix, pp. 30A-42A. In affirming the judgment of the bankruptcy court, the district court made no finding of ambiguity.

In sum, Zapata repeatedly conceded that paragraph 7 is unambiguous, and neither the bankruptcy court nor the district court expressly or impliedly found that paragraph 7 is ambiguous. On the contrary, the bankruptcy court indicated that paragraph 7 was unambiguous and stated that Zapata's evidence would be admitted solely for the purpose of "explaining" the terms of paragraph 7.

The Court of Appeals' analysis of paragraph 7 was radically different from the analysis by the bankruptcy court. The Court of Appeals found that paragraph 7 was "susceptible to more than one meaning" and thus "ambiguous as a matter of law." *See* Appendix, p. 9A. Accordingly, the Court of Appeals held that the admission of parol evidence was proper to determine the parties' intent with respect to paragraph 7.

Under those circumstances, the Court of Appeals *should* have remanded to the bankruptcy court for findings of fact based on the premise that paragraph 7 is ambiguous. *See Swint*, 456 U.S. at 291 ("When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the necessary findings."). The Court of Appeals did not follow that procedure. Instead, the Court of Appeals asserted (incorrectly) that the bankruptcy court had made findings of fact based on parol evidence. The Court of Appeals then applied Rule 52(a) to the alleged findings and held that they were not "clearly erroneous." *See* Appendix, pp. 9A-10A.

The bankruptcy court never made the decision that the Court of Appeals affirmed. As noted above, the parties agreed at trial that paragraph 7 was unambiguous. The bankruptcy court allowed Zapata to present extrinsic evidence, but stated that the evidence would be admissible only to "explain" the terms of paragraph 7. The bankruptcy court *did not* conduct a plenary hearing to determine the meaning of paragraph 7 based on parol evidence, nor did the bankruptcy court make any findings of fact regarding the parties' intent based on parol evidence.[5] Thus, the judgment of the bankruptcy court cannot be affirmed under the "clearly erroneous" standard.

This Court confronted an analogous situation in *Kelley v. Southern Pacific Co.*, 419 U.S. 318 (1974). The issue in *Kelley* was whether the plaintiff was injured "while employed" by a railroad for purposes of the FELA. This Court affirmed the holding of the Court of Appeals that the district court had applied a standard that was too lenient in determining whether the plaintiff was an "employee." However, this Court reversed the Court of Appeals' refusal to remand for further factual findings by the district court based on the correct legal standard. Although this Court noted that the district court had declined to adopt the plaintiff's proposed findings of fact on the employment issue, this Court held that, in the

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[5] The Court of Appeals alludes to the bankruptcy court's "finding that the parties intended to convey to Zapata" a pro rata portion of all three types of damages involved in the El Paso Suit. *See* Appendix, p. 10A. In fact, the bankruptcy court made no finding regarding the intent of the parties. *See* Appendix, pp. 30A-42A.

absence of an express finding by the district court, that decision was "not enough to constitute a reviewable finding that there was no master-servant relationship between petitioner and the railroad." 419 U.S. at 331-32.

Similarly, the bankruptcy court in this case applied a legal standard that the Court of Appeals found to be erroneous (*i.e.*, the bankruptcy court treated paragraph 7 as unambiguous). However, the bankruptcy court did not make any findings of fact under the correct legal standard. The mere fact that the bankruptcy court adopted Zapata's proposed findings of fact does not "constitute a reviewable finding" that Zapata's construction of paragraph 7 is correct.

The Court of Appeals' analysis is also contrary to this Court's holding in *Pullman-Standard v. Swint*, 456 U.S. 273 (1982). In that case, the Court of Appeals held that the district court erred by failing to consider certain relevant evidence. Rather than remanding to the district court for consideration of that evidence, the Court of Appeals proceeded to make its own findings of fact based on the additional evidence. Sharply criticizing the Court of Appeals, this Court reversed the decision of the Court of Appeals and ordered a remand to the district court for fact findings. 456 U.S. at 291-93.

Similarly, the bankruptcy court in this case failed to consider evidence that the Court of Appeals found to be relevant (*i.e.*, parol evidence). However, the action taken by the Court of Appeals in this case is actually *worse* than the action taken by the court in *Swint*. Rather than making its own fact findings, the Court of Appeals in this case applied the "clearly erroneous" standard to findings

of fact that were *not* made by *any* court. Consequently, the actions taken by the Court of Appeals in this case were much more unfair than the actions taken by the Court of Appeals in *Swint*.

In sum, the Court of Appeals' analysis is unsupported by the record and is contrary to this Court's decisions. This Court should therefore grant a writ of certiorari to review the judgment of the Court of Appeals.

II. The Court of Appeals' Application of Rule 52(a) Deprived TransAmerican of Due Process of Law.

The "clearly erroneous" standard set forth in Rule 52(a) reflects the need for deference to fact findings by trial courts. However, Rule 52(a) was never intended to deny a party the right to a trial. Nevertheless, that is the precise effect of the Court of Appeals' holding.

When the case was originally tried in the bankruptcy court, it was undisputed that paragraph 7 was unambiguous. As a result, TransAmerican had no incentive (and no opportunity) to present parol evidence, and the bankruptcy judge stated that he would not consider such evidence in any event. On appeal, the Court of Appeals held that parol evidence was admissible. Rather than remanding for a plenary hearing, however, the Court of Appeals applied the "clearly erroneous" standard to a nonexistent finding of fact and affirmed the judgment of the bankruptcy court on a theory that was never litigated in that court. Thus, TransAmerican never received a trial on a legal theory upon which it has been held liable for millions of dollars.

That result is contrary to the purpose and intent of Rule 52(a). Moreover, that result is contrary to fundamental due process of law. This Court should therefore grant a writ of certiorari to review the judgment of the Court of Appeals.

III. Conclusion

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Date: April 20, 1994

APPENDIX

In the Matter of Harris A. Fender, Jr., David M. Fender, and Zapata Partnership, Ltd., Debtors.

TransAmerican Natural Gas Corporation,

Appellant/Cross-Appellee,

v.

Zapata Partnership, Ltd.,

Appellee/Cross-Appellant.

No. 92-4967

United States Court of Appeals,
Fifth Circuit

January 27, 1994

REYNALDO G. GARZA, Circuit Judge:

TransAmerican Natural Gas Corporation appeals the bankruptcy and district courts' interpretation of a settlement agreement between it and Zapata Partnership, LTD. We AFFIRM the bankruptcy court in all respects, except we REVERSE the bankruptcy court's conclusion that TransAmerican owed Zapata a duty of good faith and fair dealing and the amount of attorneys' fees it awarded Zapata. If the bankruptcy court based any of Zapata's damages on breach of the duty of good faith and fair dealing, then we REMAND to reduce Zapata's damage award accordingly. Finally, we REMAND to the bankruptcy court to make the appropriate reduction in Zapata's attorneys' fees.

I. BACKGROUND

Appellant TransAmerican Natural Gas Corporation ("TransAmerican") is a Texas corporation. Appellee Zapata Partnership Ltd. ("Zapata") is a Texas limited partnership. This case is in federal court because it arose from a bankruptcy adversary proceeding. Both TransAmerican and Zapata had mineral interests in 2,000 acres of real property known as the La Perla B tract ("the tract"), which is part of the La Perla Ranch in Zapata County, Texas.

Zapata owned a 27.77 percent mineral interest in the tract.[1] TransAmerican was an operator who had obtained a leasehold interest in the tract, but had not been able to lease Zapata's 27.77 percent interest. TransAmerican and Zapata were thus cotenants in the tract's minerals. TransAmerican drilled five wells on the tract and completed three of them as gas wells. Zapata did not consent to the drilling of these wells nor did it advance any costs. The wells began producing in 1986. As an unleased cotenant, Zapata was entitled to a "profit share" of the production from the wells.

On March 20, 1987, several creditors of Zapata filed an involuntary Chapter 11 proceeding against Zapata. At the time the involuntary petition was filed, TransAmerican owed Zapata substantial sums of money in connection with the gas wells TransAmerican had drilled. Zapata filed an adversary proceeding against TransAmerican in August 1987, claiming that TransAmerican

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[1] Zapata also owned 100 percent of the surface interest and a 2.77 percent leasehold in the tract.

used improper accounting and charged Zapata in excess of its reasonable costs, forcing Zapata into bankruptcy.

Both parties agreed to settle the lawsuit, entering into a settlement agreement on December 17, 1988 which was incorporated into a final judgment in the bankruptcy court on December 19, 1988.[2] Paragraph 7 of the settlement agreement concerned the amount TransAmerican would pay Zapata as a result of TransAmerican's litigation with El Paso Natural Gas Company ("ENGC").

TransAmerican had a gas purchase agreement with ENGC which included the La Perla B gas wells. Under the agreement, ENGC was to pay TransAmerican a certain price for a set minimum amount of gas, whether ENGC actually took delivery of the gas or not. This agreement is known in the industry as a "take-or-pay" provision.[3] While TransAmerican was still litigating the first adversary proceeding against Zapata, it brought an action against ENGC claiming that ENGC had stopped taking delivery of gas and had refused to make take-or-pay payments. Therefore, when TransAmerican and Zapata were negotiating their 1988 settlement, one of the assets on the negotiation table was TransAmerican's potential recovery against ENGC.

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[2] The settlement agreement provided, among other things, for TransAmerican to pay Zapata a $1,700,000 judgment, and for Zapata to assign to TransAmerican all of its mineral interest in the tract, reserving a 17.5 percent overriding royalty interest.

[3] *Dorney v. Henderson Clay Products, Inc.*, 838 S.W.2d 314, 315 & n. 3 (Tex.App. – Texarkana 1992, writ denied).

About a year after the settlement agreement between Zapata and TransAmerican, the dispute between TransAmerican and ENGC was itself settled. Under that settlement, ENGC agreed to pay TransAmerican $300,000,000 in cash along with some noncash assets ("the El Paso recovery"). The cash damages included "price" damages, "take-or-pay" damages and "repudiation" damages.

Zapata and TransAmerican disagreed on the interpretation of paragraph 7 of their settlement agreement. After TransAmerican refused to pay sums Zapata contended were due, Zapata filed another adversary proceeding (the suit now on appeal) on March 16, 1990, alleging, *inter alia*, that TransAmerican had breached the settlement agreement.

The bankruptcy court agreed with Zapata's interpretation of paragraph 7 and found that TransAmerican had breached the settlement agreement. The bankruptcy court found that Zapata was entitled to $11,590,811 under paragraph 7. The bankruptcy court concluded, however, that because TransAmerican settled with ENGC and only received 63 percent of the damages awarded to it in cash, Zapata was only entitled to receive 63 percent of the $11,590,811. Therefore, the bankruptcy court awarded Zapata $7,300,210.93 as damages relating to paragraph 7.

TransAmerican appealed to the district court and the district court entered a judgment on July 28, 1992, affirming the bankruptcy court's interpretation of paragraph 7. The district court, however, modified the bankruptcy court's judgment with regard to Zapata's litigation expenses, and ordered that the attorneys' fees be paid directly to Zapata rather than its attorneys.

After its post-judgment motions were denied, TransAmerican filed its notice of appeal to this Court on September 16, 1992. Zapata cross-appeals challenging the bankruptcy court's reduction of its damages.

II. ANALYSIS

TransAmerican raises five issues on appeal. TransAmerican claims the bankruptcy court erred in: (1) its interpretation of paragraph 7 of the settlement agreement; (2) its rulings on parol evidence; (3) concluding that TransAmerican breached a duty of good faith and fair dealing; (4) awarding Zapata $43,200 as reimbursement for money Zapata paid to maintain its leases; and (5) the amount of attorneys' fees it awarded to Zapata.

Zapata cross-appeals claiming that the bankruptcy court erred in reducing its damage award from $11,590,811 to $7,302,210.93.

We find that the bankruptcy court did not err in: (1) its interpretation of the settlement agreement; (2) its rulings on parol evidence; (3) awarding Zapata $43,200 as reimbursement; and (4) reducing Zapata's damage award from $11,590,811 to $7,302,210.93. The bankruptcy court, however, erred in: (1) concluding that TransAmerican breached a duty of good faith and fair dealing; and (2) the amount of attorneys' fees it awarded to Zapata.

A. *Interpretation of paragraph 7*

TransAmerican claims the bankruptcy court erred in its interpretation of paragraph 7 of the December 17, 1988 settlement agreement.

Paragraph 7 of the settlement agreement reads as follows:

> Plaintiff [Zapata] will retain and be entitled to receive its pro rata portion of any money received by Defendant [TransAmerican] as a result of its litigation with El Paso Natural Gas Company with respect to any differential in price applicable to the sale of gas from wells drilled on the Ranch. Plaintiff's share of any such proceeds will be for gas sold through October 31, 1988. Any adjustment in the price obtained from gas or make-up gas taken after that date will be paid on the basis of Plaintiff's 17.5% overriding royalty interest.

TransAmerican argues that its settlement agreement with Zapata concerned only an accounting and payment for gas produced and sold from the La Perla B wells; therefore Zapata should receive its pro rata share of only that part of the El Paso recovery which relates to gas that was actually removed from the ground and delivered to a purchaser. TransAmerican's interpretation would greatly reduce Zapata's share, because the great majority of the El Paso recovery was calculated not from gas produced and sold, but from projections of gas that would have been sold had ENGC not repudiated the gas purchase agreement. The damages were to compensate harm to TransAmerican's expectation interest – its right to expect gas purchases to be made in the future under its contract with ENGC. Thus, TransAmerican argues that any money that it received in settlement of its claims against ENGC cannot be considered "money received . . . with respect to any differential in price applicable to the sale of gas from wells drilled on the ranch." TransAmerican argues that

Zapata, as the owner of an overriding royalty interest, will receive its share of revenues when the natural gas is actually produced and sold. TransAmerican claims that Zapata's rights as a royalty owner would not be infringed by this interpretation of paragraph 7.

TransAmerican concludes, therefore that Zapata should only receive a pro rata share of the "price" damages in the El Paso recovery – the portion of the settlement proceeds applicable to ENGC's refusal to pay the full contract price for gas it purchased. This interpretation of paragraph 7 would give Zapata $806 from the El Paso recovery, rather than the $7,302,210 awarded to Zapata by the bankruptcy and district courts.

Zapata in contrast, argues that this is a contract case, rather than an oil and gas case. Zapata claims that in the December 1988 negotiations – in addition to insisting upon the $1.7 million for unpaid gas production – it bargained for a larger share of the El Paso recovery in exchange for settling additional "business loss" claims it had against TransAmerican, i.e., bankruptcy expenses, accounting, breach of fiduciary duty and punitive damages.[4] Zapata claims that it is illogical that it would have settled its substantial claim for $806. Zapata asserts that instead, it bargained for and received in paragraph 7 a substantial share of the El Paso judgment. Zapata argues

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[4] In response to this point, TransAmerican argues that the "additional claims" were settled for $400,000 in Paragraph 1 of the settlement letter. The $400,000 is included in the $1.7 million judgment. Zapata replies that TransAmerican is misreading Paragraph 1, and insists that it would not have settled the whole lawsuit for $1.7 million.

that it would not have settled if TransAmerican had taken the position in 1988 that Zapata was only entitled to "price" damages.

Zapata further argues that the language of paragraph 7, "differential in price," describes the entire El Paso recovery, and that TransAmerican's witnesses admitted this on cross-examination. Moreover, Zapata argues that all of the proceeds it claimed, constituted price differentials regarding a gas contract applicable to the La Perla B Ranch. Finally, Zapata argues that the phrase "with respect to any differential in price applicable to the sale of gas from wells drilled on the Ranch" merely identifies the litigation; it does not limit the types of damages in which Zapata would share.

It is undisputed that Texas law governs the construction of the settlement agreement. "Under Texas law, the contract must be analyzed in light of all of the surrounding circumstances." *Hanssen v. Qantas Airways Ltd.*, 904 F.2d 267, 270 (5th Cir.1990). Furthermore, this court "must abide by tenents of contract construction and seek to ascertain the true intentions of the parties by examining '*the entire writing* in an effort to harmonize and give effect to *all the provisions* of the contract so that none will be rendered meaningless.' " *Chapman v. Orange Rice Mill Co.*, 747 F.2d 981, 983 (5th Cir.1984) (*citing, Coker v. Coker*, 650 S.W.2d 391, 393 (Tex.1983)) (emphasis in original). It is generally held that a document is ambiguous when it is reasonably susceptible to more than one meaning, in light of surrounding circumstances and established rules of constructions. *North Shore Lab. Corp. v. Cohen*, 721 F.2d 514, 519 (5th Cir. 1983).

Finding the settlement agreement susceptible to more than one meaning, we hold that it is ambiguous as a matter of law. "As the principles of contract interpretation dictate, we therefore, look to extrinsic evidence to interpret its terms." *Id.* Although the determination of a contract's ambiguity is a question of law, the determination of the parties' intent through extrinsic evidence is a question of fact. *Id.* Hence, we accept the bankruptcy court's factual findings of the parties' intent, unless such findings are clearly erroneous. *Id.*

The bankruptcy court did not make an express finding of ambiguity. Nonetheless, it made an implied finding of ambiguity by looking to the parties' intent to determine the settlement agreement's effect. *Id.* The bankruptcy court expressly found that K. Craig Shepard was not credible with respect to his testimony regarding the settlement agreement.[5] Shepard testified that under paragraph 7 of the settlement agreement, Zapata was entitled only to a pro rata portion of the "price" damages. The bankruptcy court also expressly found that "M. Lindsay Sneed was the most credible witness with respect to his testimony regarding the December 17, 1988 Settlement Agreement."[6] Sneed testified that the language of paragraph 7 was phrased broadly to prevent any subsequent attempts by TransAmerican to recharacterize the damages. Sneed also testified that at no time did TransAmerican's representatives suggest that paragraph 7 was

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[5] Shepard negotiated and executed the settlement agreement on behalf of TransAmerican.

[6] Sneed is Zapata's Chief Financial Officer and participated in the settlement agreement negotiations.

limited to "price" damages of approximately $806. Sneed further testified that Zapata would not have settled if TransAmerican had taken the position that Zapata was only entitled to a share of "price" damages.

Furthermore, the bankruptcy court expressly found that "[p]ursuant to the credible weight of the evidence, paragraph 7 of the December 17, 1988 Settlement Agreement is not restricted to what TransAmerican referred to as 'price' damages from the El Paso litigation." Finally, the bankruptcy court found that paragraph 7 of the Settlement Agreement entitled Zapata to recover a pro rata portion of the damages classified as (a) "price" damages, (b) "take or pay" damages and (c) "repudiation" damages from the El Paso litigation.

In affirming the bankruptcy court's interpretation of paragraph 7, the district court affirmed all of the bankruptcy court's findings of fact and conclusions of law with regard to that paragraph.

We hold that the bankruptcy court's finding that the parties intended to convey to Zapata a pro rata portion of the "price", "take or pay" and "repudiation" damages is not clearly erroneous. Generally, royalty interest owners do not share in "take or pay" payments and settlements. *Hurd Enters., Inc. v. Bruni,* 828 S.W.2d 101, 106-07 & n. 8 (Tex. App. – San Antonio, 1992, writ denied). We have been unable to find any case that holds this as to mineral interest owners and not royalty interest owners. Since we hold that the payments owed to Zapata were under the contract, we need not decide whether mineral interest owners are entitled to "take or pay" damages because the parties intended to convey these damages to Zapata in

paragraph 7 of the settlement agreement. Thus, it is paragraph 7, as evidenced by the parties intent and not Zapata's status as a mineral interest owner, that is dispositive.

Moreover, part of the reason Zapata assigned its 27.77 percent mineral and royalty interest in exchange for a 17.5 percent overriding royalty interest was that Zapata would also receive a pro rata portion of the damages from the El Paso litigation.

We, therefore, affirm the bankruptcy and district court's interpretation of paragraph 7.

B. *Parol Evidence*

TransAmerican claims that the bankruptcy court improperly considered parol evidence offered by Zapata in construing paragraph 7, but excluded parol evidence TransAmerican offered in rebuttal.

As stated earlier in this opinion, the bankruptcy court's decision to allow parol evidence was an implied finding of ambiguity. Therefore, it is unnecessary to address this issue.

C. *Duty of good faith and fair dealing*

TransAmerican claims that the bankruptcy court erred in finding that it owed Zapata a duty of good faith and fair dealing, and that TransAmerican breached this duty when it settled with ENGC without Zapata's knowledge or consent.

Zapata claims there was an imbalance in bargaining power and a relationship of trust because of Zapata's lack of knowledge about the El Paso lawsuit. However, as TransAmerican points out, the El Paso lawsuit was public record, and Zapata did not try to verify, through an examination of court records, the information about the settlement it had gleaned from the newspapers. Furthermore, the authority Zapata cites, *Gardner Mach. Corp. v. U.C. Leasing, Inc.*, 561 S.W.2d 897, 900 (Tex.Civ.App. – Beaumont 1978, writ dism'd), does not support Zapata's claim that a duty of good faith and fair dealing exists in this case.

The bankruptcy court's conclusions are contrary to Texas law. Under Texas law, there is no duty of good faith and fair dealing in contracts generally,[7] and in cotenancy law, there is no fiduciary or agency relationship (which might create such a duty) between cotenants unless they create it by agreement.[8] The 1988 settlement agreement between Zapata and TransAmerican did not create such a duty, hence Transamerican was not required to obtain Zapata's approval or consent before it settled with ENGC.

Therefore, the bankruptcy court's conclusions of law on this issue – that TransAmerican had a duty of good faith and fair dealing and breached such a duty – were

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[7] *English v. Fischer*, 660 S.W.2d 521, 522 (Tex. 1983); *Manufacturers Hanover Trust Co. v. Kingston Investors Corp.*, 819 S.W.2d 607, 610-11 (Tex.App. – Houston [1st Dist.] 1991, no writ).

[8] *Donnan v. Atlantic Richfield*, 732 S.W.2d 715, 717 (Tex.App. – Corpus Christi 1987, writ denied).

erroneous. It is unclear from the bankruptcy court's findings and conclusions of law whether it based any damages upon a breach of good faith and fair dealing. If the bankruptcy court based any of Zapata's damages upon this erroneous conclusion, then that portion of the judgment is reversed and the bankruptcy court should reduce Zapata's damages accordingly.

D. *Reimbursement for lease payments*

TransAmerican claims that the bankruptcy court erred in requiring it to reimburse Zapata for lease payments that Zapata made to maintain its leases.

The 1988 settlement agreement required Zapata to assign its mineral interest (and its 2.77 percent leasehold interest) to TransAmerican. Zapata tendered an offer of assignment, and TransAmerican refused to accept it, claiming it attempted to expand Zapata's rights beyond what had been agreed. Meanwhile, payments came due on leases Zapata was attempting to assign. Although the date on which TransAmerican was to assume responsibility for the leases had passed, Zapata made payments of $43,200 to keep the leases from terminating.

TransAmerican claims that the lease payments remained Zapata's responsibility because Zapata's tender of assignment was unacceptable. However, the bankruptcy court ordered TransAmerican to reimburse Zapata for these payments, based on its conclusion that Zapata had tendered an acceptable assignment which TransAmerican refused to accept. The district court expressly affirmed this conclusion, TransAmerican has not demonstrated that this conclusion was erroneous.

Therefore, the bankruptcy court's order requiring TransAmerican to reimburse Zapata for the lease payments is affirmed.

E. *Attorneys' Fees*

TransAmerican claims that the enhancement, which raised the attorneys' fees awarded to 1.7 times the lodestar amount, is not justified under the Texas and federal courts' standards for awarding fees. The bankruptcy court awarded Zapata $299,444.83 in attorneys' fees, which included a "lodestar" figure of $170,603 plus a "fee enhancement" of an additional $119,422.[9]

The Fifth Circuit uses the "lodestar" method to calculate attorneys' fees. *Shipes v. Trinity Industries*, 987 F.2d 311, 319-20 (5th Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 548, 126 L.Ed.2d 450 (1993). The lodestar is computed by multiplying the number of hours reasonably expended by the prevailing hourly rate in the community for similar work. *Id.* The court then adjusts the lodestar upward or downward depending upon the respective weights of the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).[10] The

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[9] The district court reversed the bankruptcy court's additional award of $9,419.83 in litigation expenses, and the parties do not contest this point on appeal.

[10] The twelve *Johnson* factors are: (1) time and labor required, (2) novelty and difficulty of the issues, (3) skill required to perform the legal services properly, (4) preclusion of other employment, (5) customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by client or circumstances, (8) amount involved and results obtained, (9)

lodestar may be adjusted accordingly to a *Johnson* factor only if that factor is not already taken into account by the lodestar. *Shipes*, 987 F.2d at 319-20.

The bankruptcy court's determination of attorneys' fees is reviewed for abuse of discretion, and its specific findings of fact supporting the award are reviewed for clear error. *Id.* at 319. Although the awarding court must explain how each of the *Johnson* factors affects its award, the amount awarded lies in the judge's discretion and is recalculated only if the judge abuses that discretion. *Longden v. Sunderman*, 979 F.2d 1095, 1100 (5th Cir.1992).

In this case, the bankruptcy court, after a separate evidentiary hearing, made findings of fact noting the great amount of time required for the prosecution of the case, the intricate and complex issues involved, the high level of skill needed, the size of the judgment achieved, the relatively low percentage relation of fees to judgment achieved, and the experience of some of Zapata's counsel. These findings take into account *Johnson* factors 1, 2, 3, 8 and 9. The district court concluded that these factors justified the bankruptcy court's upward adjustment of the lodestar by a factor of 1.7. The bankruptcy court, however, appears to have improperly double-counted several of the *Johnson* factors. As the *Shipes* case explains:

> The district court [awarding attorneys' fees] must be careful, however, not to double count a *Johnson* factor already considered in calculating

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experience, reputation and ability of the attorneys, (10) undesirability of the case, (11) nature and length of the professional relationship with the client, and (12) award in similar cases.

> the lodestar when it determines the necessary adjustments . . . Four of the *Johnson* factors – the novelty and complexity of the issues, the special skill and experience of counsel, the quality of the representation, and the results obtained from the litigation – are presumably fully reflected in the lodestar amount. Although upward adjustments of the lodestar figure based on these factors are still permissible, such modifications are proper only in certain rare and exceptional cases supported by both specific evidence on the record and detailed findings by the lower courts.

Shipes, 987 F.2d at 320.

Nothing in the bankruptcy court's findings show this case to be "rare and exceptional." Since *Johnson* factors 2, 3, 9, and 8 were already accounted for in the lodestar amount, the bankruptcy court abused its discretion in using those factors to justify its substantial upward departure from the lodestar.

Therefore, we remand to the bankruptcy court to calculate the proper amount of attorneys' fees.

F. *Reduction of Damages*

Zapata argues on cross appeal that the bankruptcy court erred in reducing its damage award.

The original judgment in the El Paso lawsuit was $480 million but only 63 percent of that, $300 million, was in cash. Hence, when the bankruptcy court calculated Zapata's pro rata share, it followed the language of paragraph 7 – "pro rata portion of any money received" – and used the cash amount rather than the total amount. Based

on this decision, the bankruptcy court reduced Zapata's share of the El Paso recovery from $11,590,811 to $7,302,210.93.

Zapata argues that since TransAmerican was allowed to negotiate whether ENGC would pay it cash or non-cash assets, it had an unfair control over Zapata's share. Zapata argues that regardless of whether it was contractually entitled to recover its pro rata share of the non-cash assets, it should be allowed to recover such proceeds as damages for breach of the duty of good faith and fair dealing. In the alternative, Zapata cites Webster's dictionary to argue that the term "money" includes property and other valuable interest, not just cash.[11]

As TransAmerican points out, there is no evidence that it intentionally withheld information from Zapata or intended to compromise Zapata's interest in the settlement proceeds. TransAmerican also repeats correctly that there was no duty of good faith and fair dealing in this case.

Therefore, the bankruptcy court's interpretation of the term "money" and its calculation of Zapata's share of the El Paso recovery are affirmed.

III. CONCLUSION

We AFFIRM the bankruptcy court in all respects, except we REVERSE the bankruptcy court's conclusion

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[11] TransAmerican cites the Random House dictionary to argue that "money" means anything generally used as a medium of exchange the same way cash is used; in normal usage, it does not mean stock, real property or intangible rights.

that TransAmerican owed Zapata a duty of good faith and fair dealing, and the amount of attorneys' fees it awarded Zapata. If the bankruptcy court based any of Zapata's damages on breach of the duty of good faith and fair dealing, then we REMAND to reduce Zapata's damage award accordingly. Finally, we REMAND to the bankruptcy court to make the appropriate reduction in Zapata's attorneys' fees.

DeMOSS, Circuit Judge, concurring in part and dissenting in part:

I concur in all of the foregoing opinion with the exception of Part II(A) and (B) as to which I respectfully dissent. In my view, the fundamental errors made by the bankruptcy judge were in never expressly deciding whether the language of the letter agreement of December 17, 1988, was ambiguous and in opening the floodgates to parol testimony as to what the various parties had in their minds when they wrote that letter agreement. The majority opinion recognizes that the bankruptcy judge never made an express finding of ambiguity, but lets the matter slide by considering that the bankruptcy judge "impliedly" made such a finding. I would not let the bankruptcy judge off so easy.

The last paragraph of the letter agreement contains the following sentence:

> "Despite the expectation of impending documentation, this agreement shall be enforceable immediately in law or in equity, without further agreements between the parties and specific performance may be compelled."

When parties include language to such effect in their written agreements, I think they are attesting to the principle of law behind the Parol Evidence Rule, i.e., this agreement reflects the totality of our agreements and is not to be varied by oral testimony as to what we were really talking about. Furthermore, in my view, the provisions of the letter agreement of December 17, 1988, and in particular Paragraphs 1 and 7 thereof, are not ambiguous. When read just as they exist on paper, the provisions can be applied to determine the rights of the parties "without further agreements," just as the quoted sentence of the letter agreement contemplated. The determination of whether a contract is ambiguous is a matter of law which this court can address de novo. I would reverse and remand for application of the settlement agreement language without consideration of the parol testimony.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

TRANSAMERICAN NATURAL GAS CORPORATION, Appellant, V. HARRIS M. FENDER, *ET AL.*, Appellees.	§ § § § § § § § § §	6:91cv16 Appeal from the United States Bankruptcy Court for the Eastern District of Texas, Tyler Division, Adversary Proceeding No. A-90-6034

Filed July 28, 1992

MEMORANDUM OPINION AND ORDER

On this day came on to be considered the instant appeal from a bankruptcy court case. After careful consideration, the Court is of the opinion that the following order should issue.

STANDARD OF REVIEW

I. Factual Findings of the Bankruptcy Court

The standard of review for factual findings made by the bankruptcy court is found in the bankruptcy rules: "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous."[1] As a corollary of that review standard, "due

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[1] Bankr. R. 8013 (in pertinent part). This standard of review applies to appeals of core proceedings, i.e., those "under [28 U.S.C.] section 157 if it invokes a substantive right provided by

regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses."[2] Case law supports the rule's instruction that broad deference is to be given the findings of the bankruptcy court under the clearly erroneous standard.[3] In discussing the meaning of the clearly erroneous standard, the United States Court of Appeals for the Fifth Circuit has stated that there are guidelines to be followed by the district court:

> "[t]he foremost of these principles . . . is that '[a] finding is clearly erroneous when although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed' . . . This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently."[4]

Additionally, the court stated that plausibility of the findings in view of the entire record is a key factor, and that a

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title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case." *Matter of Wood*, 825 F.2d 90, 97 (5th Cir. 1987). The parties have stipulated that this is a core proceeding, and the bankruptcy court found as much in its findings of fact. *See* 28 U.S.C. §§ 157(b)(2)(A), (E), (L) and (O); Finding of Fact No. 3(a).

[2] *Id.*

[3] *See, e.g., Matter of Luce*, 960 F.2d 1277, 1280 (5th Cir. 1992) (citation omitted); *Matter of Webb*, 954 F.2d 1102, 1103-1104 (5th Cir. 1992); *Matter of T.B. Westex Foods, Inc.*, 950 F.2d 1187, 1190 (5th Cir. 1992) (citations omitted).

[4] *Webb*, 954 F.2d at 1104, *quoting, Anderson v. City of Bessemer*, 470 U.S. 564, 573-574 (1985).

reversal of the bankruptcy court's decision is not merited merely because the reviewing court would have decided the case differently had it been presiding as the fact finder: "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."[5]

II. Conclusions of Law

In contrast to the clearly erroneous standard of review for findings of fact, conclusions of law reached by the bankruptcy court are to be given *de novo* review by this Court.[6]

REVIEW OF THE BANKRUPTCY COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW IN THIS CASE

I. Findings of Fact

After careful review of the parties' briefs, appendices, and the bankruptcy court's findings of fact under the clearly erroneous standard of review set out above, the Court is of the opinion that the bankruptcy court was not clearly erroneous in any of its factual findings.

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[5] *Id.*

[6] *Luce*, 960 F.2d at 1280, *citing, Jordan v. Southeast Nat'l Bank (In Re Jordan)*, 927 F.2d 221, 223-224 (5th Cir. 1991); *T.B. Westex Foods, Inc.*, 950 F.2d at 1190, *citing, New Orleans Pub. Serv. Inc. v. First Federal Sav. & Loan Ass'n of Warner Robins, Ga.*, 924 F.2d 74, 76 (5th Cir. 1991) (*quoting United States v. United States Gypsum Co.*, 333 U.S. 364, *reh'g denied*, 333 U.S. 869 (1948)) (conclusions due "plenary review").

Therefore, the Court is of the opinion that the bankruptcy court's findings of fact should be affirmed.

II. Conclusions of Law

After careful review of the parties' briefs, appendices, and the bankruptcy court's conclusions of law under the *de novo* standard of review set out above, the Court is of the opinion that the bankruptcy court was correct in its conclusions of law except as regarding the award of litigation expenses to Zapata and the initial payee of the attorneys' fees.[7] In this regard, the Court makes the following conclusions of law, which pertain specifically to the issues raised on appeal.[8]

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[7] Although the bankruptcy court did not make a finding of fact or reach a conclusion of law in which it set a dollar amount of attorneys' fees due to Zapata, it did find and conclude that Zapata was entitled to a recovery of reasonable attorneys' fees. (Find. of Fact No. 33; Concl. of Law No. 33.) After a hearing on the matter, the bankruptcy court issued an order on December 20, 1990 in which it analyzed the pertinent issues and awarded fees to Zapata in the amount of $290,025.00 along with litigation expenses in the amount of $9,419.83. (Order Determ. Amt. of Att. Fees Awarded to Pl. in Fin. J., P. 7.) Thus, the order awarding attorneys' fees is an outgrowth of the findings and conclusions which determine that Zapata is due reasonable attorneys' fees. The Court, under its *de novo* review standard, therefore treats the order awarding attorney's fees as part of the bankruptcy court's conclusions of law, and amends that award as such.

[8] In noting these conclusions, the Court does not find that any other conclusions reached by the bankruptcy court were in error. Rather, the points of law addressed by this Court in the instant order merit special attention as being especially pertinent to the issues raised on appeal.

1. Because the parties entered into the December 17, 1988 settlement agreement which governed their rights under a previous adversary proceeding, and because the instant appeal arises out of a dispute concerning that settlement agreement, this case is governed by contract law.

2. Paragraph Seven (7) of the settlement agreement provides that Zapata Partnership, Limited ("Zapata") was due to receive certain percentages of TransAmerican Natural Gas Corporation's ("TransAmerican's") recovery from its lawsuit against El Paso Natural Gas Company, including portions of the take-or-pay, repudiation, and price damages.

3. Zapata sufficiently complied with its responsibilities under the settlement agreement in order for it to be entitled to specific performance under that document.

4. The bankruptcy court correctly awarded $43,200.00 to Zapata as reimbursement for maintaining its own leases. Those funds were paid out by Zapata in order to prevent an expiration of the lease interests which Zapata, under the settlement agreement, was required to assign to TransAmerican. Due to TransAmerican's failure to accept Zapata's offers of assignment, Zapata was not able to assign the leases to TransAmerican before the lease payments were due.

5. The bankruptcy court correctly awarded reasonable and necessary attorney's fees to Zapata, with the exception of litigation expenses awarded in its separate

order.[9] In so concluding, the Court notes the great amount of time required for the prosecution of this case, the intricate and complex issues involved, the high level of skill needed to competently advocate for Zapata, the size of the judgment achieved, the relatively low percentage relation of fees to judgment achieved (less than ten percent), and the experience of some of Zapata's counsel.[10] The Court is of the opinion that these factors in particular support an award of attorney's fees in the amount which the bankruptcy court made. Costs of litigation above and beyond reasonable attorneys' fees are not recoverable under applicable Texas law, and thus the bankruptcy court's award of litigation expenses must be vacated.[11] Thus, the total amount of fees awarded should be reduced to $290,025.00.

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[9] *See* Order Determ. Amt. of Att. Fees Awarded to Pl. in Fin. J. PP. 7-8. In that order the bankruptcy court awarded $290,025.00 as reasonable attorneys' fees, and $9,419.83 as additional litigation expenses.

[10] These factors are drawn from the twelve factors listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717 (5th Cir. 1974), and applied in light of Texas Civil Practice and Remedies Code § 38.001, et seq. (Vernon 1986). *See Gulf Union Industries, Inc. v. Formation Security, Inc.*, 842 F.2d 762, 766-767 (5th Cir. 1988) (discussing the application of the *Johnson* factors in light of the Texas attorney fees statute). Zapata cites *Gulf Union* case for the proposition that expenses are recoverable under the Texas fee statute. (Zap. Resp. to TransAm. Mot. Alter/Amend Order Award. Att. Fees, P. 24.) A close reading of that case, however, reveals that the issue was one of reasonableness, necessity, excessiveness, and reasonable relation to the amount in controversy – i.e., the appellant in that case did not assert that such expenses were not recoverable at all under Texas law, as TransAmerican has in the instant appeal.

[11] *Flint & Associates v. Intercon. Pipe & Steel*, 739 S.W.2d 622, 626-627 (Tex.App. – Dallas 1987); *Sparks v. Baxter*, 854 F.2d 110,

6. Although the amount of attorneys' fees awarded was correct (except for the inclusion of litigation costs as noted above), the bankruptcy court's order that directed TransAmerican to pay the fees directly to counsel for Zapata was in error; instead, the court should have ordered the payment of fees to Zapata itself, as the real party in interest in this action.[12]

7. The bankruptcy court correctly reduced the amount of Zapata's damages from $11,590,811.00 to $7,302,210.93, as a percentage of the "money received" by TransAmerican as a result of the TransAmerican/El Paso litigation.[13] Zapata states no convincing reasoning in support of its argument that the award should not have been reduced,

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115 (5th Cir. 1988) (*citing Flint*). As a matter of policy, the typical litigation expenses "make up the overhead of a law practice, are considered in setting hourly billing rates and reasonable fees, and may be recovered as a component of such fees . . . Except as included in reasonable legal fees, there is no basis for recovery of such expenses under [Texas Civil Practice and Remedies Code] section 38.001." *Flint*, 739 S.W.2d at 627.

[12] *See Streeter v. Thompson*, 751 S.W.2d 329, 331 (Tex.App. – Fort Worth 1988) (court directed the payment of fees to the party rather than the attorneys when the pleadings "prayed for the recovery of attorneys' fees and not an award of attorneys' fees to their respective attorneys").

[13] The first sentence of the December 17, 1988 settlement agreement provides as follows: "[Zapata] will retain and be entitled to receive its pro rata portion of any *money received* by [TransAmerican] as a result of its litigation with El Paso Natural Gas Company . . . " (Sett. Ag., Para. 7 (emphasis added).) The clear import of the phrase "money received" is that cash or its equivalent, and not property, would be subject to Zapata's claim of a percentage of interest.

and the language of the settlement agreement supports the reduction.

8. Any of the above conclusions of law determined to be a finding of fact shall be deemed as such.

CONCLUSION

After careful review under the appropriate standards of the bankruptcy court's Findings of Fact and Conclusions of Law and the parties' briefs and appendices, the Court is of the opinion that the bankruptcy court's findings and conclusions should be affirmed, except as regarding the initial payee of the attorneys' fees and the payment of litigation expenses. It is, therefore,

ORDERED that the bankruptcy court's Order Determining Amount of Attorneys' Fees Awarded to Plaintiff in Final Judgment be AMENDED so as to order Trans-American to make payment of attorneys' fees not to counsel for the appellee, but to the Appellee Zapata itself. It is, further,

ORDERED that the bankruptcy court's Order Determining Amount of Attorneys' Fees Awarded to Plaintiff in Final Judgment be AMENDED so as to delete the Nine Thousand, Four Hundred Nineteen Dollars and Eighty-Three Cents ($9,419.83) ordered paid as litigation expenses. It is, further,

ORDERED that the bankruptcy court's Findings of Fact and Conclusions of Law are hereby AFFIRMED in all things, except as expressly set out above.

SIGNED this 27th day of July, 1992.

/s/ William M. Steger
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

IN RE:	§	
HARRIS R. FENDER, JR., DAVID M. FENDER, AND ZAPATA PARTNERSHIP, LTD.,	§	CONSOLIDATED CASE NO. TY-87-00445
Debtors.	§	
ZAPATA PARTNERSHIP, LTD.,	§	
Plaintiff,	§	ADVERSARY NO. A-90-6034
vs.	§	
TRANSAMERICAN NATURAL GAS CORPORATION,	§	
Defendant.	§	

Filed December 13, 1990

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Came on before the Court on October 30, 1990 for trial on the merits the above-styled adversary proceeding. Counsel for Plaintiff Zapata Partnership, Ltd., counsel for Defendant TransAmerican Natural Gas Corporation, and counsel for Intervenor NCNB Texas National Bank having appeared, and upon consideration of the pleadings, the testimony, the exhibits properly admitted into evidence, the credibility and demeanor of the witnesses who testified at the trial, and the briefs and arguments of counsel,

the Court makes the following findings of fact and conclusions of law:

1. Mr. K. Craig Shepard was not credible with respect to his testimony regarding the December 17, 1988 Settlement Agreement.

2. Mr. M. Lindsay Sneed was the most credible witness with respect to his testimony regarding the December 17, 1988 Settlement Agreement.

3. The parties stipulated to the following facts and the Court so finds:

a. This Court has jurisdiction over this controversy pursuant to 28 U.S.C. §1334(B) AND (D) AND Article 15.01(D) of Debtors' Second Amended Consolidated Plan of Reorganization and Disclosure Statement (the "Plan") which provides for this Court to retain jurisdiction over controversies pending as of the confirmation of the Plan and arising in or relating to Debtors' Chapter 11 proceeding. The Plan was confirmed by an Order entered by the Bankruptcy Court on March 3, 1988. This controversy is a "core proceeding" pursuant to 28 U.S.C. §157(b) (2) (A), (E), (L) and (O).

b. Zapata is a reorganized debtor and was a proponent of the Second Amended Consolidated Plan of Reorganization and Disclosure Statement confirmed by order entered March 3, 1988 in its Chapter 11 case number TY-87-0045. Zapata is a Texas limited partnership with its principal place of business in Texas.

c. A portion of the bankrupt estate of Zapata was an undivided twenty-five percent (25%) of all the minerals and an approximate two and seventy-seven one hundredths percent (2.77%) leasehold estate in

such minerals (collectively, the "Zapata Mineral Interests") with respect to approximately two thousand (2,000) acres of real property known as the "La Perla Ranch" in Zapata County, Texas (the "Property"). Zapata owns a 25% mineral interest, 2.77% leasehold interest, and a 100% surface interest in the Property.

d. TransAmerican had in the past repeatedly and unsuccessfully attempted to farm out or lease Zapata's interest in the Property. In April 1986, TransAmerican moved a drilling rig onto the Property and drilled five wells and completed three gas wells on the Property.

e. TransAmerican is the lessee, by assignment, of an undivided leasehold working interest in the oil and gas in and under the Property.

f. An involuntary Petition for Relief under Chapter 11 of the Bankruptcy Code was filed against Zapata on March 20, 1987.

g. At the time of the filing of said involuntary petition, TransAmerican owed substantial sums of money to Zapata.

h. In 1987, Zapata was not receiving payments from TransAmerican with respect to the Zapata Mineral Interests, so in August, 1987, Zapata filed the Adversary Proceeding in connection with the Bankruptcy Proceeding in an attempt to force TransAmerican to turn over to Zapata all sums due Zapata in connection with the Zapata Mineral Interests.

i. The United States District Court for the Eastern District of Texas, Tyler Division, withdrew reference on the Adversary Proceeding, and it was set for trial before the Honorable Judge Robert Parker in the United States District Court for the Eastern District of

Tyler, Tyler Division, (the "District Court") under Case No. TY-88-00079.

j. On December 17, 1988, an agreement was reached in the Adversary Proceeding, and the settlement was memorialized by a letter from Troy D. Phillips, then counsel for Zapata, to Michael P. Kovich, then counsel for TransAmerican, which was acknowledged by each and executed by Zapata and TransAmerican (the "Settlement Agreement").

k. The parties executed the December 17, 1988 Agreement by and through authorized representatives.

l. The December 17, 1988 Agreement provides for substantially the following:

(1) the parties to cause a Judgment to be entered in the form of Exhibit "A" thereto providing for a payment of $1,300,000.00 to Zapata as proceeds from production through October 31, 1988 from the Zapata Mineral Interests and $400,000.00 as special damages as compensation for, but not limited, costs of litigation including attorneys' fees and fees for other professionals, interest, harm to Zapata's business, the willful knowing failure to account for production and to pay proceeds of production and as a substantial contributing cause of Zapata's bankruptcy;

(2) TransAmerican to make payments on the Judgment in the form of $575,000.00 cash and a $1,125,000.00 promissory note due and finally payable on January 1, 1990, and payable at the rate of $100,000.00 per month bearing interest at NCNB prime plus one percent (1%) beginning January 1, 1989 and continuing monthly as therein provided;

(3) Zapata to assign to TransAmerican the Zapata Mineral Interests while reserving a 17.5% of 8/8's overriding royalty interest in the Property;

(4) TransAmerican to provide Zapata full access to research information as specified therein;

(5) TransAmerican to control uses and prohibit hunting and fishing on the Property as therein provided;

(6) TransAmerican to hold the interest assigned in subparagraph 3 above only to the extent that it is earned under the El Paso Farmout Agreement by the drilling and completion of producing wells, with any acreage not earned to revert back to Zapata; and

(7) TransAmerican to pay to Zapata or its designee, on a monthly basis, production proceeds beginning November 1, 1988 based on the retained 17.5% of 8/8's overriding royalty interest.

(8) Zapata to retain and be entitled to receive a pro rata portion of any money received by TransAmerican as a result of the El Paso Litigation with respect to any differential in price applicable to the sale of the gas from wells drilled on the ranch, Zapata's share of the proceeds to be for any gas sold through October 31, 1988 and any adjustment in price obtained from gas or makeup gas taken after October 31, 1988 to be paid on the basis of Zapata's retained 17.5% of 8/8's overriding royalty interest.

m. In furtherance of the Settlement Agreement, the parties agreed to a Final Judgment which was

entered by the District Court in the Adversary Proceeding. The Final Judgment was in the amount of $1,700,000.00, representing $1,300,000.00 for proceeds of production through October 31, 1988 from the Zapata Mineral Interests and $400,000.00 as special damages.

n. On March 16, 1990, Zapata commenced the instant adversary proceeding.

o. TransAmerican was a debtor in a Chapter 11 proceeding in the United States Bankruptcy Court for the Southern District of Texas, Houston Division, Case No. 84-03474-HI-5. The actions upon which this adversary proceeding is based occurred subsequent to the filing under Chapter 11 by TransAmerican and are therefore subject to this suit pursuant to 28 U.S.C. §959.

p. On or about December 28, 1989, TransAmerican filed in the Adversary Proceeding its Motion for Leave to Deposit in Court in the Nature of Interpleader. Said Motion requested permission to satisfy the Final Judgment entered pursuant to the Settlement Agreement by depositing $1,088,299.61 into the Registry of the Court and allowing the Court to determine who, as between Zapata and its creditors (specifically NCNB), is entitled to all or part of that sum.

q. On or about December 28, 1989, by Order signed by Judge Parker, the District Court granted leave for TransAmerican to deposit the $1,088,299.61 into the Registry of the Court for interpleader.

r. On or about February 16, 1990, TransAmerican tendered the funds and filed in the Adversary Proceeding a Motion for Release of Judgment requesting release from the Final Judgment.

s. The District Court heard arguments on the Motion for Release of Judgment and referred the action to this Court to be consolidated with this action and heard in conjunction with the trial on this matter by order entered July 17, 1990.

t. Thereafter, NCNB and Zapata filed a Joint Motion for Disbursement of Funds Interpled into the Registry of the Court (the "Joint Motion"). On October 9, 1990, this Court entered an Agreed Order Approving Disbursement of Funds Interpled into the Registry of the Court, and the funds have since been disbursed to NCNB for the benefit and credit of Zapata.

u. TransAmerican made a cash payment of $575,000.00 for the benefit of Zapata and paid $36,700.39 on December 29, 1988 as a pro rata share of production for November, 1988 based on the seventeen and one-half percent (17.5%) of eight-eighths (8/8th's) overriding royalty interest Zapata was to retain pursuant to the Settlement Agreement.

v. With the release of funds deposited in the Court in this action, TransAmerican has paid $1,700,000.00 to or for benefit of Zapata to be credited against the Final Judgment.

w. Zapata filed its Second Amended Consolidated Plan of Reorganization and Disclosure Statement on October 20, 1987, and filed its first Modification to the Plan on February 2, 1988 and the Second Modification to the Plan on March 1, 1988 (the "Plan"). The Plan was confirmed by order entered March 2, 1988. Pursuant to the Plan, specifically, the Second Modification to the Plan, a portion of NCNB's Class 3 secured claim was to be satisfied by Zapata's execution of new promissory notes in the amount of $7,540,000.00 and $3,160,000.00 secured by a continuing lien on the Zapata Mineral Interests,

Zapata's 100% surface interest in the Property, and Zapata's proceeds from the Adversary Proceeding. Zapata's proceeds from the Adversary Proceeding and Zapata's Mineral Interests are to be paid to NCNB on account of its secured Class 3 claim pursuant to the Second Modification to the Plan, and the timing and manner of Zapata's receipt of same directly affects the interest rate payable by Zapata to NCNB under the Plan on this new note and the determination of whether Zapata is in default under the Plan with respect to its payment of NCNB's Class 3 secured claim.

x. TransAmerican obtained a judgment on April 11, 1988 against El Paso Natural Gas Company in the El Paso Litigation in the amount of $66,583,868.68, part of which was attributable to payments for gas for the years 1985 and 1986 which had not been made by El Paso. The judgment also included an award of damages in the amount of $602,801,980.68 to TransAmerican against El Paso Natural Gas Company, plus prejudgment interest of $6,006,032.17, post-judgment interest at 10%, and attorneys' fees.

y. TransAmerican settled the Judgment with El Paso Natural Gas Company ("El Paso Natural") by execution of a Compromise Settlement Agreement.

z. The Compromise Settlement Agreement of the Judgment provided for payment by El Paso Natural Gas Company to TransAmerican in the amount of $300,000,000.00 and the transfer by El Paso Natural to TransAmerican of its gas interests in the La Perla Ranch in Zapata County. In addition, the Compromise Settlement Agreement severed the relationship between TransAmerican and El Paso Natural, and allowed no make-up by El Paso Natural under the take-or-pay agreement and/or the Judgment.

4. The parties agreed in the December 17, 1988 Settlement Agreement that, despite the expectation of impending documentation, the December 17, 1988 Settlement Agreement was enforceable immediately, in law or equity, without further agreements between the parties and that specific performance may be compelled.

5. The December 17, 1988 Settlement Agreement is part and parcel of the Final Judgment.

6. The Final Judgment comprises only part of the December 17, 1988 Settlement Agreement, which includes entry of the Final Judgment in addition to the other terms of the December 17, 1988 Settlement Agreement.

7. Zapata has properly and timely tendered an Assignment to TransAmerican sufficient to comply with the terms of the December 17, 1988 Settlement Agreement.

8. TransAmerican has failed and refused to comply with the terms of the December 17, 1988 Settlement Agreement and to pay to Zapata its pro rata share of proceeds from the sale of oil and/or gas production from the Property after November 30, 1988.

9. The December 17, 1988 Settlement Agreement contemplates an accounting by TransAmerican for proceeds of oil and gas production from the Property for November 1988 forward. No such accounting has been made to Zapata for proceeds after June 30, 1990.

10. The $168,970.36 which TransAmerican has paid into the registry of the Court accounts for remaining amounts owed to Zapata on the Final Judgment.

11. The payment of additional sums due pursuant to the Final Judgment does not fully resolve all disputes between TransAmerican and Zapata, nor does it permit Zapata to comply with the Plan with respect to payment of NCNB's Class 3 secured claim. The payment of all sums due under the Final Judgment only satisfies a portion of the second provision of the December 17, 1988 Settlement Agreement. It leaves part of the second provision and all of the remainder of the December 17, 1988 Settlement Agreement unsatisfied.

12. Other than the payment by TransAmerican to Zapata of the $36,700.39 as a pro-rata share of production of November, 1988 based on the 17.5% of 8/8's overriding royalty interest Zapata retained under the December 17, 1988 Settlement Agreement and the $168,970.36 deposited with the Court to satisfy the Final Judgment, Zapata has received no payment from TransAmerican from the sale of production from the Property for November, 1988 to the present, either for the 17.5% of 8/8's overriding royalty interest Zapata retained under the Settlement Agreement or for the Zapata Mineral Interests.

13. Based on a 17.5% of 8/8's overriding royalty for production proceeds from the Property from December 1, 1988 through June 30, 1990, TransAmerican owes Zapata $739,675.00, to which sum TransAmerican stipulated in open Court.

14. TransAmerican owes Zapata an additional sum of approximately $60,325.00 for production proceeds from the Property for July and August 1990 based on a 17.5% of 8/8ths overriding royalty, to which sum TransAmerican stipulated in open Court, and to which sum it

has agreed to pay to Zapata and to verify by providing an accounting of production and sales figures to Zapata.

15. TransAmerican owes to Zapata ongoing royalties from the La Perla "B" Ranch based on a 17.5% of 8/8ths overriding royalty interest, such royalties to be paid from September 1, 1990 forward on a monthly basis and to be accounted for to Zapata on a monthly basis.

16. TransAmerican owes Zapata $43,200.00 for payments made to royalty owners for November, 1988 through October 30, 1990.

17. The December 17, 1988 Settlement Agreement obligates TransAmerican to continue to pay royalty owners on the leases assigned to TransAmerican pursuant thereto.

18. The Court finds Plaintiff's Exhibit 37 to be the most credible evidence concerning Zapata's entitlement to monies under paragraph 7 of the December 17, 1988 Settlement Agreement.

19. Pursuant to the credible weight of the evidence, paragraph 7 of the December 17, 1988 Settlement Agreement is not restricted to gas actually sold to El Paso Natural Gas Company.

20. Pursuant to the credible weight of the evidence, paragraph 7 of the December 17, 1988 Settlement Agreement is not restricted to what TransAmerican referred to as "price" damages from the El Paso Litigation.

21. Paragraph 7 of the December 17, 1988 Settlement Agreement entitles Zapata to recover a pro rata portion of the damages classified as (a) "price" damages,

(b) "take or pay" damages and (c) "repudiation" damages from the El Paso Litigation relating to the Property.

22. The Court finds Zapata's pro rata portion of damages recoverable from the El Paso Litigation to be 27.77% through October 31, 1988 and 17.5% after such date.

23. Based upon the various damage determinations made in the El Paso Litigation and upon Plaintiff's Exhibit 37, Zapata is entitled to $11,590,811.00 pursuant to paragraph 7 of the December 17, 1988 Settlement Agreement.

24. Zapata did not acquiesce in, consent to or otherwise agree in any way to the Compromise Settlement Agreement between TransAmerican and El Paso Natural Gas Company.

25. TransAmerican's Compromise Settlement Agreement with El Paso Natural Gas Company occurred subsequent to the December 17, 1988 Settlement Agreement between TransAmerican and Zapata.

26. Zapata did not acquiesce in, consent to or otherwise agree in any way to compromise or reduce its rights to the monies which it bargained to receive pursuant to paragraph 7 of the December 17, 1988 Settlement Agreement.

27. TransAmerican did not notify Zapata that TransAmerican would enter into or had entered into a Compromise Settlement Agreement with El Paso Natural Gas Company.

28. "Money received" as set forth in paragraph 7 of the December 17, 1988 Settlement Agreement means the

$300,000,000.00 cash portion of TransAmerican's Compromise Settlement Agreement with El Paso Natural Gas Company.

29. The $300,000,000.00 cash portion of TransAmerican's Compromise Settlement Agreement with El Paso Natural Gas Company is sixty-three percent (63%) of the total judgment against El Paso Natural Gas Company after remittitur, so Zapata is entitled to recover sixty-three percent (63%) of the total portion it would have been entitled to receive from TransAmerican's judgment against El Paso Natural Gas Company.

30. Zapata is entitled to recover sixty-three percent (63%) of the $11,590,000.00 to which it is entitled pursuant to paragraph 7 of the December 17, 1988 Settlement Agreement by reason of TransAmerican's Compromise Settlement Agreement with El Paso Natural Gas Company.

31. Zapata is entitled to recover $7,302,210.93 as its pro rata share of the cash portion of TransAmerican's Compromise Settlement Agreement with El Paso Natural Gas Company.

32. Zapata is entitled to post-judgment interest at the prevailing rate pursuant to 28 U.S.C. § 1961 from date of entry of the judgment in this adversary proceeding until the date the judgment is paid by TransAmerican.

33. Zapata is entitled to recover reasonable attorneys' fees as part of its damages for TransAmerican's breach of the December 17, 1988 Settlement Agreement in an amount to be determined by separate order of this Court.

34. In the event that any of the foregoing Findings of Fact are determined to be Conclusions of Law they shall be deemed as such.

CONCLUSIONS OF LAW

1. This adversary proceeding involves the interpretation of the rights and obligations of TransAmerican and Zapata pursuant to contract law.

2. The December 17, 1988 agreement constitutes a final settlement agreement and is enforceable as a binding contractual obligation of the parties.

3. The Final Judgment and the December 17, 1988 Settlement Agreement are part of the same agreement to settle the prior Adversary Proceeding styled *Zapata Partnership. Ltd. v. TransAmerican Natural Gas Corporation,* Adversary Number 87-0342.

4. The December 17, 1988 Settlement Agreement was enforceable immediately, in law or equity, without further agreements between the parties and specific performance by TransAmerican is compelled.

5. Zapata is entitled to specific performance of the December 17, 1988 Settlement Agreement.

6. Zapata has performed in accordance with the December 17, 1988 Settlement Agreement.

7. TransAmerican is estopped from contesting the enforceability of the December 17, 1988 Settlement Agreement, as TransAmerican has accepted the benefits of the

Final Judgment portion of the December 17, 1988 Settlement Agreement and made payment of monies in furtherance of the December 17, 1988 Settlement Agreement. TransAmerican therefore waived any claim it may have had to assert that the December 17, 1988 Settlement Agreement is unenforceable.

8. TransAmerican breached the December 17, 1988 Settlement Agreement and caused damages to Zapata by such breach.

9. The Compromise Settlement Agreement and Mutual Release tendered to the Court as Exhibits "A" and "B" to the Joint Pretrial Order are to be modified in accordance with the rulings of the Court. TransAmerican and Zapata are required to execute these documents under the December 17, 1988 Settlement Agreement.

10. The Assignment of Mineral Interests and Leasehold Interests tendered by Zapata is an acceptable document. TransAmerican and Zapata are required to execute this document under the December 17, 1988 Settlement Agreement.

11. The Partial Release of Lien tendered to the Court by NCNB is an acceptable document and is required to be tendered to TransAmerican and Zapata pursuant to the December 17, 1988 Settlement Agreement.

12. TransAmerican owes the duty of utmost good faith and fair dealing to Zapata.

13. TransAmerican breached its duty of utmost good faith and fair dealing to Zapata.

14. TransAmerican converted that money which is rightfully owed to Zapata and which was and is to be held for and paid to Zapata under the December 17, 1988 Settlement Agreement.

15. The conversion of Zapata's property caused it to incur damages.

16. Monies due to Zapata from sale of oil and gas production and other monies due to Zapata pursuant to the December 17, 1988 Settlement Agreement represent property of the estate pursuant to 11 U.S.C. § 541.

17. Pursuant to 11 U.S.C. § 542, TransAmerican must turnover to Zapata, for the benefit of Zapata's chapter 11 estate and payment of its creditors under the Plan, monies due to Zapata pursuant to the December 17, 1988 Settlement Agreement.

18. Pursuant to 11 U.S.C. § 542, TransAmerican was required to render an accounting to Zapata for monies due to Zapata pursuant to the December 17, 1988 Settlement Agreement.

19. The December 17, 1988 Settlement Agreement, itself, requires an accounting by TransAmerican for proceeds of oil and gas production from the Property for November, 1988 forward and for the proceeds of the El Paso Litigation and the proceeds of the settlement of the El Paso Litigation. Zapata finally received such an accounting, except as to production proceeds from the Property after June 30, 1990, at the trial of this adversary proceeding.

20. TransAmerican's failure to comply with the December 17, 1988 Settlement Agreement, including but

not limited to (i) to pay Zapata for its pro rata share proceeds from the sale of oil and gas production from the Property for November, 1988 forward, (ii) to pay Zapata its pro rata share of proceeds from the El Paso Litigation in accordance with paragraph 7 of the December 17, 1988 Settlement Agreement, and (iii) to account to Zapata for such production proceeds and El Paso Litigation proceeds, has directly affected treatment and payment of NCNB's claim against Zapata's estate under the Plan confirmed by order entered March 3, 1988.

21. Pursuant to section 1142(b) of the Bankruptcy Code, this court is authorized to direct the debtor and any other necessary party to "execute and deliver or to join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act . . . that is necessary for the consummation of the plan." The Court shall require TransAmerican to comply with the December 17, 1988 Settlement Agreement pursuant to 11 U.S.C. § 1142(b).

22. Paragraph 7 of the December 17, 1988 Settlement Agreement entitles Zapata to recover its pro rata share of damages relating to "price" damages, "take or pay" damages and "repudiation" damages in the El Paso Litigation with respect to La Perla "B" wells.

23. The Court finds Zapata's pro rata portion of damages recoverable from the El Paso Litigation to be 27.77% through October 31, 1988 and 17.5% after such date.

24. Based upon the damage determinations made in the El Paso Litigation and upon Plaintiff's Exhibit 37,

Zapata is entitled to $11,590,811.00 pursuant to paragraph 7 of the December 17, 1988 Settlement Agreement.

25. Zapata did not acquiesce in, consent to, or otherwise agree in any way to the Compromise Settlement Agreement between TransAmerican and El Paso Natural Gas Company.

26. Zapata did not acquiesce in, consent to, or otherwise agree in any way to compromise or reduce its rights to the monies which it bargained to receive pursuant to paragraph 7 of the December 17, 1988 Settlement Agreement.

27. The Compromise Settlement Agreement between El Paso Natural Gas Company and TransAmerican was a non-recoupable settlement allowing no make-up under the take-or-pay gas contract or the judgment in the El Paso Litigation by El Paso Natural Gas Company.

28. "Money received" as set forth in paragraph 7 of the December 17, 1988 Settlement Agreement means the $300,000,000.00 cash portion of the Compromise Settlement Agreement entered into by TransAmerican and El Paso Natural Gas Company.

29. The $300,000,000.00 cash paid by El Paso Natural Gas Company to TransAmerican under the Compromise Settlement Agreement as a percentage of the total El Paso Litigation judgment after remittitur is sixty-three percent (63%); therefore, Zapata is entitled to 63% of the total damages it claimed based on Plaintiff's Exhibit 37.

30. Zapata is therefore entitled to recover sixty-three percent (63%) of the $11,590,811.00 to which it is entitled pursuant to paragraph 7 of the December 17,

1988 Settlement Agreement by reason of TransAmerican's Compromise Settlement Agreement with El Paso Natural Gas Company.

31. Zapata is entitled to recover $7,302,210.93 as its pro rata share of the cash portion of TransAmerican's Compromise Settlement Agreement with El Paso Natural Gas Company.

32. Pursuant to 28 U.S.C. § 1961, Zapata is entitled to post-judgment interest at the prevailing rate pursuant to 28 U.S.C. § 1961 from date of entry of the judgment in this adversary proceeding until the date the judgment is paid by TransAmerican.

33. Zapata is entitled to reasonable attorney's fees as part of its damages in an amount to be determined by separate order of this Court.

34. In the event any of the foregoing Conclusions of Law are determined to be Findings of Fact, they shall be deemed as such.

This adversary proceeding is hereby closed.

Dated this 12th day of December, 1990.

/s/ C. Houston Abel
C. HOUSTON ABEL
UNITED STATES
BANKRUPTCY JUDGE

In the Matter of Harris A. Fender, Jr., David M. Fender, and Zapata Partnership, Ltd., Debtors.

TransAmerican Natural Gas Corporation,

Appellant/Cross-Appellee,

v.

Zapata Partnership, Ltd.,

Appellee/Cross-Appellant.

Filed on March 15, 1994

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above-entitled and numbered cause be and the same is hereby DENIED. Judge DeMoss would grant the petition for rehearing.

ENTERED FOR THE COURT:

/s/ Reynaldo G. Garza
United States Circuit Judge